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In the Supreme Court of the United States

MELVIN ELLIS HOLLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that an erroneous jury instruction was harmless beyond a reasonable doubt with respect to one of petitioner's convictions.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 488 F.3d 1298.

JURISDICTION

The judgment of the court of appeals (Pet App. 34a-35a) was entered on June 12, 2007. A petition for rehearing was denied on July 10, 2007 (Pet. App. 36a-37a). The petition for a writ of certiorari was filed on October 8, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Oklahoma, petitioner was convicted of making a false statement, in violation of 18 U.S.C. 1001, tampering with a witness, in violation

of 18 U.S.C. 1512(a)(2)(C) (Supp. V 2005), five counts of felony deprivation of rights under color of law involving aggravated sexual abuse, in violation of 18 U.S.C. 242, and seven counts of misdemeanor deprivation of rights under color of law, also in violation of 18 U.S.C. 242. Pet. App. 2a. Petitioner was sentenced to aggregate terms of 300 months of imprisonment, to be followed by 36 months of supervised release. Gov't C.A. Br. 3-4. On appeal, petitioner challenged only his five felony convictions under 18 U.S.C. 242. Pet. App. 3a. The court of appeals affirmed one of those convictions, reversed the remaining four convictions, and remanded for a new trial on the four reversed counts. Pet. App. 1a-33a.

1. For eight years, petitioner served as the sheriff of Latimer County, Oklahoma. Gov't C.A. Br. 4. During his tenure, petitioner engaged in unlawful sexual contact with inmates of the Latimer County Jail (Jail), employees of the Jail, and the daughter of an employee of the Jail. Pet. App. 2a; Gov't C.A. Br. 4-5. A grand jury in the Eastern District of Oklahoma returned a 15-count superseding indictment charging petitioner with one count of making a false statement, in violation of 18 U.S.C. 1001, one count of tampering with a witness, in violation of 18 U.S.C. 1512(a)(2)(C) (Supp. V 2005), five counts of felony deprivation of rights under color of law involving aggravated sexual abuse, in violation of 18 U.S.C. 242, and eight counts of misdemeanor deprivation of rights under color of law, in violation of 18 U.S.C. 242. Pet App. 2a.

2. In August 2005, petitioner was tried before a jury. Pet. App. 2a. In support of the counts charging petitioner with felony deprivation of rights under color of law involving aggravated sexual abuse, the government presented the testimony of five female witnesses

who had been inmates at the Jail while petitioner was sheriff. *Id.* at 3a.[1] The testimony showed that petitioner had engaged in nonconsensual sexual intercourse with four of those inmates and had attempted to have sexual intercourse with the fifth inmate (fifth victim), who resisted and petitioner abandoned his effort. *Ibid.*; Gov't C.A. Br. 5-21. Each victim testified that she was scared at the time of the sexual assault by petitioner. Pet. App. 4a. Each victim also testified that petitioner was wearing his service gun before the sexual assault and placed the gun within reach during the assault. *Ibid.* The fifth victim further testified that petitioner looked repeatedly at his gun just before the sexual assault upon her and orally threatened to "get to" her family, including her nine-year-old sister, if she did not cooperate with petitioner. *Ibid.*

With respect to the five counts of deprivation of rights under color of law involving aggravated sexual abuse, the district court instructed the jury that it could find that petitioner's "conduct involved aggravated sexual abuse" if it found either that petitioner "used force during the alleged sexual assault" or that petitioner "placed the victim in fear of death, serious bodily injury, or kidnapping." Pet. App. 5a-6a. The court further instructed that "[t]he requirement of fear may be satisfied when the [petitioner's] actions implicitly place the victim in fear of some bodily harm." *Id.* at 6a. The jury found petitioner guilty on all five counts of felony deprivation

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[1] Because petitioner challenged only his felony convictions under 18 U.S.C. 242 in the court of appeals, and because the issue raised in the petition for a writ of certiorari relates to one of those convictions, we limit our discussion to the facts relevant to the felony Section 242 counts.

of rights under color of law involving aggravated sexual abuse. *Ibid.*

3. On appeal, petitioner challenged only his five felony convictions under 18 U.S.C. 242. Pet. App. 3a. Petitioner argued that the district court erred in instructing the jury on the definition of aggravated sexual abuse and challenged both the "force" and "fear" components of the district court's instruction. *Id.* at 7a.[2] The court of appeals found no error in the "force" instruction but agreed with petitioner that the district court erred when it instructed the jury that "[t]he requirement of fear may be satisfied when the [petitioner's] actions implicitly place the victim in fear of *some bodily harm*." *Id.* at 10a (emphasis added). The court explained that to commit aggravated sexual abuse, a defendant must place the victim in fear of *death, serious bodily injury, or kidnapping*, 18 U.S.C. 2241(a)(2), and that the district court's instruction erroneously omitted the requirement that the victim experience a "heightened level of fear" under the statute. *Id.* at 11a-12a.

Relying on *Neder* v. *United States*, 527 U.S. 1 (1999), the court of appeals determined that the district court's instructional error was reviewable under the constitutional harmless-error standard. Pet. App. 13a-19a.[3]

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[2] Section 242 does not define "aggravated sexual abuse," but the federal aggravated sexual abuse statute, 18 U.S.C. 2241, provides that an individual commits aggravated sexual abuse if he knowingly causes another person to engage in a sexual act either "by using force against that other person" or "by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping." 18 U.S.C. 2241.

[3] Although the government did not raise harmless error as an alternative ground for affirming petitioner's convictions, the court of appeals, in its discretion, elected to engage in "full-scale harmless error

With respect to Count 5 of the indictment—which related to the fifth victim—the court of appeals concluded that the element of "fear of death, serious bodily injury, or kidnapping" was "'uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error.'" *Id.* at 23a (quoting *Neder*, 527 U.S. at 17). The court relied on the fifth victim's uncontested testimony that petitioner threatened to "get to" her family and sister—a threat that "upset" the fifth victim "very much"—as well as petitioner's repeated glances at his gun before the assault on the fifth victim. *Id.* at 24a-25a. The court ruled that the fifth victim's testimony provided "overwhelming and uncontroverted evidence" that petitioner placed her in fear that she or her sister would be subjected to death, serious bodily injury, or kidnapping. *Id.* at 23a-26a. The court of appeals ruled that the evidence that petitioner placed the other four victims in fear of death, serious bodily injury, or kidnapping was "neither uncontested nor overwhelming." *Id.* at 26a-28a. The court therefore affirmed petitioner's conviction for depriving the fifth victim of her rights under color of law and reversed the remaining four felony convictions under 18 U.S.C. 242. Pet. App. 28a.

Judge Kelly dissented from the court's decision to affirm petitioner's 18 U.S.C. 242 conviction relating to the fifth victim. Pet. App. 29a-33a. Relying on pre-*Neder* precedent, Judge Kelly opined that the district court's instructional error was not subject to harmless-error review. *Id.* at 32a. Assuming harmless-error review were available as a matter of law, Judge Kelly also

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review" with respect to the five convictions challenged by petitioner. Pet. App. 20a-23a.

would have declined to apply such review *sua sponte* to petitioner's case, in light of the government's failure to assert harmlessness on appeal. *Id.* at 32a-33a.

ARGUMENT

Petitioner contends (Pet. 4-5) that the court of appeals deprived him of his Sixth Amendment right to a jury trial when it applied harmless-error review to the district court's instructional error. Petitioner also contends (Pet. 4) that the court of appeals' decision conflicts with the Ninth Circuit's decision in *United States* v. *Mitchell*, 502 F.3d 931 (2007). Further review is not warranted. The court of appeals did not err, and its decision does not conflict with any decision of this Court or another court of appeals.

1. Petitioner's argument that the court of appeals' application of harmless-error review to the district court's instructional error violated his Sixth Amendment right to trial by jury is without merit. In *Neder* v. *United States*, 527 U.S. 1 (1999), this Court considered whether a jury instruction that omitted an element of an offense could be evaluated for harmlessness under *Chapman* v. *California*, 386 U.S. 18 (1967). This Court held that the omission of an offense element from a jury instruction, like a misdescription of an offense element in a jury instruction, is subject to harmless-error review even though both errors "preclude[] the jury from making a finding on the actual element of the offense." *Neder*, 527 U.S. at 10. The Court explained that "the absence of a 'complete verdict' on every element of the offense establishes no more than that an improper instruction on an element of the offense violates the Sixth Amendment's jury trial guarantee" but does not render the error immune from harmless-error analysis. *Id.* at

12. The Court determined that the error in *Neder*—the omission of the element of "materiality" from the jury instruction on the offense of tax fraud—was harmless beyond a reasonable doubt because "the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error." *Id.* at 16-17.

The court of appeals correctly applied the constitutional harmless-error analysis approved in *Neder* to the facts of this case and concluded that the fifth victim's uncontested testimony concerning petitioner's threat to "get to" her family, combined with petitioner's purposeful gazes at his gun, demonstrated that "there [was] no way a rational jury could have concluded [the fifth victim] was placed in fear of some bodily harm, as this jury necessarily did, without also concluding she was placed in fear of death or serious bodily injury." Pet. App. 24a-25a.[4] In other words, the court held, petitioner's "conviction on Count [5] is like the defendant's conviction in *Neder* where the element that was not properly submitted to the jury was supported by overwhelming and uncontroverted evidence." *Id.* at 26a (citing *Neder*, 527 U.S. at 17).

Petitioner relies (Pet. 5) on Justice Scalia's dissenting opinion in *Neder* to support his argument that by

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[4] Petitioner argues (Pet. 3-4) that the fifth victim's testimony did not necessarily establish that she was in fear, because the fifth victim was directly asked by the prosecutor only whether she was "upset." The court of appeals, however, rested its harmless-error finding not on the fifth victim's testimony that she was "upset" by petitioner's conduct, but instead on the uncontested evidence concerning petitioner's threats and the reasonable inferences that any rational jury would draw from that evidence. Pet. App. 25a. In any event, the fact-bound harmless-error analysis engaged in by the court of appeals does not warrant this Court's review.

engaging in harmless-error analysis, the court of appeals improperly became a "super jury or ultimate jury" and "speculat[ed] as to what the jury would have found." Those arguments, however, were rejected by the majority in *Neder*, which explained that a reviewing court applying harmless-error analysis "does not * * * become in effect a second jury to determine whether the defendant is guilty." *Neder*, 527 U.S. at 19 (citation and internal quotation marks omitted). Instead, "in typical appellate-court fashion, [the reviewing court] asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted [or misdescribed] element." *Ibid.* If petitioner is asking this Court to revisit *Neder*, he has not made the heightened showing necessary to overcome principles of stare decisis. See, *e.g.*, *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984) (departure from the doctrine of stare decisis demands special justification).[5]

2. Petitioner also contends (Pet. 4) that the manner in which the court of appeals applied harmless-error analysis conflicts with *United States* v. *Mitchell*, 502

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[5] There is no need to hold this case pending the Court's resolution of *Chrones* v. *Pulido*, cert. granted, No. 07-544 (Feb. 25, 2008). *Chrones* presents the question whether the Ninth Circuit erred in granting habeas relief on the ground that the submission of two alternative theories of guilt to the jury, one of which was legally erroneous, constituted structural error. 07-544 Pet. i. Although the petition in *Chrones* discusses the implications of *Stromberg* v. *California*, 283 U.S. 359 (1931), see 07-544 Pet. 12-13, as did the majority opinion here, see Pet. App. 14a-17a, the court below ultimately correctly concluded that *Stromberg* is not implicated in this case, because this case involves misdescription of a single element, not the submission of an entirely erroneous theory as an alternative basis for finding guilt. This case is therefore controlled by *Neder*, and the Court's resolution of *Chrones* will not affect the analysis or outcome here.

F.3d 931 (9th Cir. 2007). Petitioner is incorrect. *Mitchell* involved the Federal Death Penalty Act. The defendant alleged, *inter alia*, that the district court erred by instructing the sentencing jury that it could consider post-mortem mutilation in connection with one of the statutory aggravating factors. *Id.* at 975-977. The Ninth Circuit concluded that even if the district court erred in allowing the jury to consider the challenged evidence, the error was "undoubtedly harmless" because the jury found five other statutory aggravating factors, any one of which was sufficient to render the defendant death-eligible. *Id.* at 977. Although the government had not argued that the alleged instructional error was harmless, the court elected to conduct harmless-error review nonetheless. *Id.* at 977-978. In support of that decision, the court noted that "[u]nlike most harmless error inquiries, [the inquiry presented in *Mitchell* was] not a fact-based inquiry where the length and complexity of the record might deter appellate courts from *sua sponte* conducting a harmless error analysis." *Id.* at 978.

Contrary to petitioner's claim (Pet. 4) that *Mitchell* "held that harmless error is not a fact based inquiry," *Mitchell* supports the opposite proposition. The court in *Mitchell* observed that "most harmless error inquiries" are indeed "fact-based." *Mitchell*, 502 F.3d at 978. The Ninth Circuit merely noted that in reaching its own discretionary decision to engage in harmless-error analysis despite the government's failure to argue the point, the court considered whether the analysis would entail "a fact-based inquiry where the length and complexity of the record might deter" the court from proceeding *sua sponte*. *Ibid.* The court of appeals in this case subscribed to that approach as well. Pet. App. 22a

("Despite this court's general reluctance to *sua sponte* apply harmless error review, it may be appropriate to do so where [as here] the certainty of the harmlessness is readily apparent."). The court proceeded with harmless-error analysis *sua sponte*, because the court's "preliminary review" of the trial record demonstrated that the harmlessness of the trial court's error with respect to Count 5 was "both certain and readily apparent." *Id.* at 22a-23a. There is no conflict between the court of appeals' decision and *Mitchell*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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